No. 12,544

IN THE

United States Court of Appeals

For the Ninth Circuit

MATANUSKA VALLEY FARMERS COOPERATING ASSOCIATION, a Corporation,
Appellant,

vs.

C. R. MONAGHAN,
Appellee.

Appeal from the District Court of the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

GEORGE B. GRIGSBY,
Anchorage, Alaska,
Attorney for Appellee.

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STATEMENT OF THE CASE.

The Appellee, plaintiff in the Court below, during the period beginning December 1, 1944, and ending November 30, 1945, was engaged in the dairy business at or near Palmer, Alaska. During the period mentioned he sold his milk to the Appellant, defendant below, according to the terms of a written Contract entered into between himself and the defendant Association on June 30, 1939.

The Contract is called the "Members Standard Marketing Contract", hereinafter referred to as the

Contract. It is set forth in full on pages 58 to 73 of the Transcript of Record.

One of the prerequisites of becoming a member of the Matanuska Valley Cooperating Association was the signing of this Contract by the producer (Code of By-Laws, Article IV, sec. 4, and Article XII, sec. 3, Defendant's Exhibit No. 2).

The Contract bound the plaintiff to sell his milk to the defendant Association and the Association became bound to pay for the same according to the terms of the Contract.

The plaintiff brought this action to recover from the defendant the balance claimed to be due him, according to the terms of the Contract, on the purchase price of milk sold and delivered by him to the defendant during the period beginning December 1, 1944, and ending November 30, 1945. This period is hereinafter referred to as the year 1945. Besides plaintiff's cause of action his complaint includes twenty-one other causes of action based upon the assignment to plaintiff of the claims of twenty-one other dairymen, all of whom sold milk to the defendant Association during the same period and on the same terms.

The manner, method and terms of payment for produce bought and sold are set forth in paragraphs (5), (6), (7) and (8) of the Contract. Paragraphs (7) and (8) relate to the manner of arriving at the purchase price.

Paragraph (7) is as follows:

"(7) The Association agrees to pay or cause to be paid through its Management and Sales Agency to the Producer the amounts received for the said resale of said products sold separately or the amounts representing Producer's interest in products resold wherein his products are pooled or co-mingled with others as provided for in Paragraph 6 herein after making deductions to cover the following items in connection therewith: (a)repayment of advances made to Producer under Paragraph 4 of this Contract and interest on said advances; (b) reasonable charges for the services of receiving, handling and selling said agricultural products under Paragraph 5 of this Contract; (c) operating and maintenance expenses; (d) one dollar each year in payment of the official publication of the Association in case said publication is issued; (e) two per centum (2%) of the gross sales price received for the products of said members sold separately or of the amounts representing said member's interest in products sold wherein his products are pooled or co-mingled with others as funds belonging to the Association to meet its indebtedness and additional expenses, contribute to the Association's reserves (with which to acquire ownership of industries and enterprises and property in connection therewith and for other proper purposes), to pay interest on capital stock by way of dividends and for other proper purposes as provided for by the laws of Alaska pertaining to 'Cooperative Associations' under which the Association has been incorporated and by the By-Laws of the Association."

Paragraph (8) is as follows:

> "(8) The Association is hereby authorized to process or manufacture into changed or new products the products delivered hereunder and pay the Producer as provided for in Paragraph 7, from the proceeds from resale of the changed or new products or at its discretion to pay a flat delivery price therefor to the Producer as full payment thereof and thereafter process or manufacture it into changed or new products on its own account and at its own expense as its own product and sell and retain the full proceeds thereof as amounts belonging to the Association."

The complaint alleges that the dairymen sold their milk to the defendant according to the provisions of paragraphs (6) and (7) of the Contract (R. 3, par. IV).

The answer admits that the milk was bought and sold under the terms of the Contract but denies that the transaction was according to the terms of paragraphs (6) and (7) and alleges on the contrary that the milk was sold and purchased at a fixed price per hundred pounds.

Thus, the only substantial issue raised by the pleadings is whether or not the sale of milk by the dairymen to the Association was made according to paragraphs (6) and (7), or according to paragraph (8) of the Contract. That is to say, whether or not the milk was sold at a fixed flat price or whether it was sold at a price to be determined by the net proceeds of the resale of the milk by the defendant Association

after making the deductions set forth in paragraph (7).

The trial Court determined this question in favor of the plaintiff (R. 126-127, Findings of Fact V).

ARGUMENT.

The Appellant contends that this case comes to this Court presenting essentially questions of law (Appellant's Brief, page 8). The Appellee contends that this case was tried in the lower Court and comes to this Court on the only issue raised by the pleadings, as stated above in Appellee's statement of the case, and essentially on questions of fact.

No error is assigned other than those based on the trial Court's Findings of Fact and the Court's refusal to make certain Findings of Fact suggested by the defendant, except the formal assignments of error, that the Court erred in its Conclusion of Law, that the plaintiff was entitled to recover from the defendant the sum of $28,700.60 and certain interest, and that the Court erred in rendering its judgment for the plaintiff and against the defendant (R. 134-141).

In Appellant's Brief (page 7), the Specifications of Error are that the District Court erred as to Finding of Fact V (R. 126-127) and as to its Conclusion of Law that the plaintiff was entitled to recover the amount above stated, and in making and entering judgment accordingly.

This Brief, therefore, will be limited to an analysis of the evidence in the case. It is not found necessary to seriously dispute any of the propositions of law advanced by Appellant, nor to determine whether or not they are sustained by the authorities cited.

REVIEW OF TESTIMONY.

To sustain the allegations of the complaint that the dairymen sold their milk to the defendant Association under paragraph (7) of the Contract, the plaintiff of necessity had to rely to a large extent upon the accounts and books of the defendant Association, written statements furnished by it, and testimony of its officers.

Roland Snodgrass was called on behalf of plaintiff. He testified that he was a member of the Board of Directors of the defendant Association during 1941, 1942 and 1943. That he was its manager from January 1944 until February 1946 (R. 345). That he was a member of the Association and sold milk to the defendant in 1940, '41, '42, '43 and '44, but not while he was manager.

Roland Snodgrass testified in part as follows:

> Q. (by Mr. Grigsby). Did you ever in any of those years when you sold and delivered milk to the defendant corporation sell it at a fixed price that you were to ultimately get for your milk so sold and delivered?
>
> A. Yes, it is my opinion that I did every year.

Q. What is that?

A. I did every year.

Q. At a fixed——

A. At a fixed price.

Q. A fixed final price?

A. In some cases it became final and some cases it did not become final.

Q. But did you ever agree with the Co-Op at the beginning of any fiscal year for what ultimate price you would sell your milk—flat figure?

A. Yes, I did.

Q. All right, every year?

A. I'll tell you what I did if it will help.

Q. What is that?

A. The first year I agreed to sell, at a fixed flat price.

Q. Then how about the second year?

A. All right, the second year there was no agreement made; they simply raised the price and we went on. There was no new agreement. The first year I agreed to sell at a certain price.

Q. All right now, haven't you every year since '42 delivered your milk and received certain payments upon delivery, or——

A. Yes.

Q. On the total deliveries for each bi-monthly period?

A. That's right.

Q. And then been paid additional sums for that milk subsequent to the Audit?

A. That's right.

Q. That is true, isn't it?

A. That is true.

Q. That was true of '44?

A. That was true of '44.

Q. That was true of 1943?

A. That is right.

Q. And it was true of '42?

A. That's correct.

Q. But in '41 you sold for a fixed flat price?

A. No, I received an additional payment in 1941.

Q. You got additional payments in 1941 also?

A. That's right.

Q. All right now, in the milk you sold in '45, did you sell your milk for a flat ultimate price?

A. In 1945 I sold no milk.

Q. You were working in the office?

A. That's right.

Q. Did anybody sell any milk at a flat fixed ultimate price in '45?

A. You mean did they agree to sell it or did they sell it?

Q. Did they agree to sell it for so much per one hundred pounds?

A. There was no agreement that I know of to that effect. (R. 336-337).

* * * * * * *

Q. However, you never did agree to take a flat price for your milk, at any time for your milk sold in '42-3 or '44?

A. No such agreement. I made such an agreement, to clear the record in 1940 to take a flat price.

Q. For that year?

A. For that year.

Q. But you always have received additional payments after the audit?

A. In 1941-42-43 and '44. (R. 340).

* * * * * * *

Q. All right then, now you didn't so state. Now, I am asking you if from the time the Co-Op started delivering milk in Anchorage and selling it here, on any scale to amount to anything, in 1940, has the Co-Op ever purchased milk from the dairymen at a flat fixed final price?

A. No. Now we are getting where we can make sense. As I said the last time you asked me, I sold milk at a flat price in 1940 because there wasn't any suggestion of anything more or anything less—in 1940. Now, you ask me things about flat price and so on, but when you used the word "final" I can say no.

Q. All right, since 1940 you always have made the farmers additional payments after the close of the fixed fiscal year?

A. That is correct, yes.

Q. For their milk?

A. That is right.

Q. And have you not then paid the farmers ever since '40 according to the terms of paragraph (7) of this Contract?

A. Just as closely as we could.

Q. That is what you have tried to follow?

A. That is what we have tried to follow.

Q. All right, and after deducting operating expenses and indirect overhead, and then, according to paragraph (7) they are entitled to all the net, aren't they?

A. Well——

Q. Well, are they or are they not?

A. According to paragraph (7) I believe they are entitled to all the net after those deductions.

Q. And you have been trying to pay them off as near as you could according to paragraph (7)?

A. That is correct. (R. 373-375).

* * * * * * *

Q. I will read you section (8):

"The Association is hereby authorized to process or manufacture into changed or new products the products delivered hereunder and pay the Producer as provided for in Paragraph 7, from the proceeds from resale of the changed or new products or at its discretion to pay a flat delivery price therefor to the Producer as full payment thereof and thereafter process or manufacture it into changed or new products on its own account and at its own expense as its own product and sell and retain the full proceeds thereof as amounts belonging to the Association."

Now, you have never done that since 1940 in dealing with the milk farmers?

A. We have not done it since 1940.

Q. You have never told any seller of the price—that he was selling his milk at a flat fixed price?

A. No. That is right.

Q. And you know that hasn't been done?

A. That is correct. (R. 378).

The plaintiff Monaghan and seven of the dairymen who assigned their claims to him testified for the plaintiff. They were John Lyle Cope, Walter E. Huntley, Wilhelm Ising, Arvid Johnson, Frank McAllister, Clarence Quarnstrom and Aaron A. Rempel.

McAllister testified that he signed the Contract on June 30, 1939; that he had been in the dairy business for the past five years. (He testified on March 13, 1947). During that time he sold all his milk to the defendant Association under the terms and conditions of the Contract.

Q. Did you ever sell them any milk for a flat price?

A. I did not.

Q. Have you been advanced money when you delivered milk on account of the purchase price?

A. I have.

Q. And that's every year?

A. Every year. (R. 174).

The witness further testified that during every year mentioned he received an advance payment upon delivery of his milk and for the years 1942, 1943 and 1944 received additional payments over and above the payments advanced (R. 176).

He produced a statement furnished by the Association showing the amount of milk sold by the dairymen interested in this suit and the amount advanced therefor for the fiscal year 1945, the period from December 1, 1944, to November, 1945, which was introduced in evidence as Plaintiff's Exhibit No. 2 (R. 179).

We append here the extracts from the testimony of Arvid Johnson which seem to dispose of this question and also to completely demolish the flat or fixed price contention.

Arvid Johnson testified that he was one of the claimants in the case, and as follows:

Q. Now, with reference to milk: In 1944, it is in evidence here, that additional sums of money—you call them payments—were paid to the milk producers for the product of 1943. That was true in your case, was it?

A. That's right.

Q. Now, did you receive additional payments in 1943 for the '42 production?

A. Yes.

Q. And how far back did that go?

A. If I recall I think we received money in 1941 and also in 1944, that is up to 1944.

Q. For the production of the previous year?

A. That's right.

Q. And in 1945 you received money for the 1944 production?

A. Correct.

Q. In addition to the down payments?

A. Yes. (R. 423-424).

* * * * * * *

Q. Mr. Johnson, have you any of the slips showing those additional payments with you?

A. I have for 1943 and '44 (handed to Mr. Grigsby).

Q. And here is one dated September 10, 1945?

A. Well, that's for '44. (R. 428).

* * * * * * *

Q. This check here "Second Payment on Milk Pool: 20% of dollar value $6187.25"; now, do you remember when you got that—what year?

A. Well, that was paid I believe in April 1945 and the other one was paid along in September, 1945.

Q. Now, there must have been a first payment prior to that time?

A. Well, your first payment is what you get every two weeks. (R. 428-429).

In connection with Arvid Johnson's testimony, two slips were introduced in evidence identified by him as remittance advices showing additional payments made to him in 1944, for the milk sold by him in 1943; these two slips were introduced as Plaintiff's Exhibit No. 10. (R. 430).

Johnson also identified two slips showing additional payments made to him in 1945 for milk sold by him in 1944. (Plaintiff's Exhibit No. 11, R. 431).

Plaintiff's Exhibits Nos. 12 and 13 show the same situation with regard to payments made to Wilhelm Ising. (R. 433-435).

Aaron A. Rempel, one of the claimants, testified that he came to Palmer, Alaska, on February 18, 1944, joined the Association and started to deliver milk the first of March; that before he started delivering milk he had a conversation with Roland Snodgrass, the manager of the Association, as to the price he was to get for his milk; that Snodgrass explained to him that he would receive a down payment for his milk of better than $6.00 for one hundred pounds. (R. 388). Rempel then testified as follows:

Q. And go ahead, what's the rest of the conversation—the explanation?

A. The manager explained that after the year's over then what is made, profit, on the milk

is divided and you recover in two payments. He just had received one payment. I don't remember exactly what his check was but it was a payment he got and he expected another payment sometime later in the year.

Q. He showed you a check?

A. He had a check in his hand. He showed me he just got a check.

Q. That was the additional payment for the '43 operations, was it?

A. Yes, '43. (R. 389).

* * * * * * *

Q. Along in March, when you were talking to him he had got a pretty substantial payment and would get another one?

A. Yes, it was in February I talked to him—the first of March I started already to deliver milk.

Q. And that was his explanation to you of how you're paid for your milk and how you would be paid?

A. Yes. (R. 387-390).

Roland Snodgrass had previously testified that he was manager of the Association from January, 1944, to February 5, 1946, (R. 345). He was subsequently called as a witness but did not contradict the testimony of Aaron Rempel, above quoted, with reference to the explanation made to him as to how he was to be paid for his milk.

The other dairymen called as witnesses by the plaintiff, including the plaintiff himself, testified to substantially the same facts shown by the testimony above quoted, that is, with reference to the terms on

which they sold their milk during the period in question and in prior years and as to their understanding of the Contract.

The remaining fourteen dairymen interested in this suit were not called as witnesses. However, it was stipulated by the plaintiff and defendant that the remaining claimants would testify in substance that for the year's production, commencing with 1942, 1943, and including 1944, they received after the close of the year, substantial sums of money as second and final payments, in substance as these witnesses who had been on the stand and testified. (R. 441-442).

The payments made to the dairymen after the close of the fiscal year are evidenced by the slips introduced in evidence as Plaintiff's Exhibits 5 (R. 225), 7 (R. 397), 8 and 9 (R. 403), 10 (R. 430), 11 (R. 431), 12 (R. 433), 13 (R. 434), 14 (R. 436), 15 (R. 440), 16 (R. 441) and 17 (R. 525).

These exhibits and the testimony given in connection with their admission prove beyond any doubt that beginning with the year's production for 1943, which means the period from December 1, 1942, and ending November 30, 1943, the amount of the additional payments after the audit made after the close of the fiscal year was figured on a percentage of the amount paid in cash upon delivery of milk, that is, the total of the cash payments made bi-monthly after delivery.

The system used is explained by the testimony of the plaintiff Monaghan (R. 246), who testified on cross-examination as follows:

A. These slips were issued after the audit, and when they got their preliminary figures from the auditor the first time that they paid the 20% —see, that would be in the spring of '44—they says we haven't the final audit but we do know that we can safely make a part payment on it. If the farmers needed money to operate in the spring, that we would, we can pay 20% safely, we know, now and they did so. Then after the—they got the books back from the auditor he had gone back to Juneau and took the books back and when they got their final figures and everything was all paid off—everything—all the deductions and everything—we got the balance from the second payment (R. 246).

The remittance slips introduced in evidence and heretofore listed were furnished by the defendant Association. They all designate the additional payments, made after the close of the fiscal year, either as "Final payment on milk pool", "Second milk pool advance", "Second payment on milk pool" or "Final payment milk and cream pool".

REPORTS OF AUDIT.

After the close of each fiscal year the Association had their books audited by a firm of accountants. The Report of Audit for the period ending November 30, 1945, was introduced in evidence as Plaintiff's Exhibit No. 6.

The Report of Audit for the period ending November 30, 1944, was introduced in evidence as Defendant's Exhibit No. 1.

Both these exhibits were very voluminous and in accordance with a stipulation (R. 603-4) are not printed in the record but are before the Court in their original form. Pages 2, 3 and 4 of Plaintiff's Exhibit No. 6 comprise a comparison by units of the results of operations of the Association for the year 1945 and 1944.

At the beginning of page 2 of this exhibit is the following statement:

> OPERATING RESULTS:
> THE RESULTS OF OPERATIONS FOR THE FISCAL YEAR ENDED NOVEMBER 30, 1945, ARE SHOWN IN DETAIL ON EXHIBIT "B". A CONDENSED COMPARISON WITH THE FISCAL YEAR ENDED NOVEMBER 30, 1944, AFTER GIVING CONSIDERATION TO ADDITIONAL PAYMENTS TO PRODUCERS FOR MILK AND EGGS PURCHASED IN 1944, APPEARS BELOW.

On page 3 of the exhibit the following note is appended:

> (1) AFTER GIVING EFFECT TO ADDITIONAL PAYMENTS TO MILK AND EGG PRODUCERS OF $47,528.40.

On page 16 of the same exhibit are the following notes:

20% ADDITIONAL PAYMENT TO MILK PRODUCERS	$22,563.31
21.125 ADDITIONAL PAYMENT TO MILK PRODUCERS	23,355.89
ADDITIONAL PAYMENT TO EGG PRODUCERS	1,609.20

The above figures total $47,528.40 and show that the sum of $45,919.20 was the total of additional payments made in 1945 for the milk sold to the defendant Association during the fiscal year ending November 30, 1944.

Similar data appears in Defendant's Exhibit No. 1, which is the Report of Audit for the period ending November 30, 1944.

On pages 3 and 4 of this latter exhibit is a comparison of the results of the operations of the years 1944 and 1943, and on page 3 of the exhibit the following note is appended:

> (1) Additional payments to producers of milk, cream, eggs, and meat in the amount of $47,516.19, for 1943 were made in 1944 and charged against 1943 income.

These same additional payments are also noted on page 6 and again on page 16 (Note 3) of Defendant's Exhibit No. 1.

The foregoing extracts from the Association's Reports of Audit demonstrate that the Association designated the additional payments made to milk producers after the close of the respective fiscal years, as payments, and regarded them as payments on the purchase price, and not as dividends, or pro-rata distribution of profits as contended by Appellant.

The Reports of Audit revealed even more convincing evidence than the foregoing.

On page 17 of Defendant's Exhibit No. 1, the Cost of Goods Sold by the Creamery-Dairy Unit is entered

as $129,729.54. Likewise, on page 4 of Defendant's Exhibit No. 1 the Cost of Goods Sold is carried as $129,729.54. On page 4 the Creamery-Dairy Unit is designated as Unit No. 13-14. Page 4 is a comparison by units of the operations of 1944 and 1943.

Now, turning back to page 4 of Plaintiff's Exhibit No. 6, we find a comparison by units of the operations of 1945 and 1944. On this page the Creamery-Dairy Unit is likewise designated as Unit No. 13-14. But on this page, the Cost of Goods Sold in 1944 is carried at $177,257.94, which is exactly the total arrived at by adding to the sum of $129,729.54 the sum of $47,528.40, being the amount of additional payments made in 1945 for milk and eggs bought in 1944, as appears in the note appended to page 3 of Plaintiff's Exhibit No. 6, and hereinbefore cited.

In other words, the Association during the period from December 1, 1943, to November 30, 1944, paid for the creamery-dairy goods the sum of $129,729.54. In 1945 the Association made additional payments to the dairymen and egg producers of $47,528.40 and added it in to the item, Cost of Goods Sold $129,-729.54, arriving at the sum of $177,257.94, as the total purchase price or cost of the goods sold by the creamery-dairy during the period ending November 30, 1944.

Nowhere in the records, audits or minute books of the Association is the word "dividend" used in connection with additional payments made to producers for their products sold to the Association during the previous year.

The plaintiff and the dairymen called as witnesses have all testified that they sold their milk under the terms of paragraph (7) of the Contract and have produced written evidence supporting their testimony.

The witness, Roland Snodgrass, the manager of the defendant Association, corroborated their testimony.

It has been stipulated that the fourteen dairymen interested but not called as witnesses would, if called, have testified substantially to the same effect (R. 441-442).

The dairymen interested in this action represent about 60% of the total amount of milk sold to the Association in the fiscal year ending November 30, 1945 (R. 593-594), and about the same percentage of the number of dairymen (R. 196).

None of the other 40% have been called as witnesses for the defendant, in fact no witness was called by defendant Association who testified that he sold his milk during the period mentioned at a flat price, under the provisions of paragraph (8) of the Contract.

EVIDENCE FOR DEFENDANT.

The only evidence produced in support of Appellant's flat price contention consists of Defendant's Exhibits Nos. 4, 6, 7, 8, 9 and 10 (R. 306, 551, 554, 556, 558 and 561).

Defendant's Exhibit No. 4 is a schedule of "Milk prices paid to farmer" from December 1, 1941, to October 1, 1946.

Defendant's Exhibit No. 6 purports to be the minutes of a meeting of the Board of Directors of February 10, 1943, showing that McAllister (one of the claimants) moved that a schedule of milk and cream prices be established subject to confirmation at the next meeting, the proposed schedule being included in the motion.

Exhibit No. 7 is the minutes of a meeting of the Board of Directors of February 13, 1943, confirming the proposed schedule but designating it as a schedule of "Milk and cream *payments*" (italics ours).

Exhibits Nos. 8 and 9 have no apparent relevancy to the issue.

Exhibit No. 10 relates to 1946 and is at least as consistent with Appellee's contentions as were those of Appellant.

The witness McAllister thoroughly explained, both on direct and cross-examination, that the bi-monthly payments for milk delivered were advance payments. The prices adopted were advance prices, for the milk delivered (R. 174-176, 190-192, 209-212). No witness has contradicted his testimony and it is corroborated by all the record evidence in the case.

ARGUMENTS OF APPELLANT IN SUPPORT OF FLAT PRICE CONTENTION.

What is lacking in testimony to support the flat price contention, the Appellant endeavors to supply by argument. In the Brief of Appellant on pages 27 and 28 is the following statement:

"(b) If paragraph (7) were interpreted to apply to a pool conducted in accordance with paragraph (6) the dairymen in normal course would have insisted upon an accounting covering the proceeds of their milk at the end of each two weeks or at least at the end of each month. Why would they wait until the Spring of the year following for their settlement, as they did? Paragraph (6) itself refers to 'daily,' 'weekly' and 'monthly' pools. The evidence is undisputed that by the end of each bi-monthly period the Association ordinarily had resold the milk delivered during the preceding two weeks (R. 513). It could have responded to a demand on the part of the producers to account and remit the proceeds of resale under paragraph (7) at that time, if it could do so at all."

We call attention to the following sentence contained in the foregoing statement:

"Paragraph (6) itself refers to 'daily,' 'weekly' and 'monthly' pools."

The writer of the Brief neglected to mention that paragraph (6) refers to daily, weekly, monthly, seasonal, yearly and/or other pools (R. 62). This omission seems deliberately unfair since the undisputed evidence is that the Association did establish a yearly milk pool. Furthermore, the contention of Appellant is absurd because it is perfectly apparent from the evidence in the case that a monthly accounting to the dairymen would have involved a monthly audit of all the uits in order to determine the balance due the dairymen after the deduction of their proportionate share of the general and administrative expenses of

the Association. At any rate, the dairymen did not insist on such an accounting but were satisfied with a reasonable bi-monthly cash payment sufficient to enable them to carry on their business, until the balance due them could be determined after the annual audit.

It is true that the individual producers did not separately appear before the Association and request advances on their delivered produce and place upon the Association the burden of inquiring into the financial situation and needs of each individual dairyman. That system would have required the establishment of another department. Instead of such a system the evidence shows that the Association adopted as a substitute a system of paying an established advance price. This is shown by the exhibits introduced by the defendant Association and this advance price applied both to milk producers and other producers, the potato farmers being advanced a stipulated sum per ton.

Appellant also argues that the interest on advances was not deducted. As the milk was resold shortly after delivery and the advance price paid bi-monthly after resale, the dairymen never had the use of the Association's money, consequently, no interest was or could be charged.

In connection with the question of requested advances, it must be remembered that the Members Standard Marketing Contract was prepared long before the Association took over the assets of its predecessor, the Alaska Rural Rehabilitation Corporation,

referred to in the Contract as the Corporation, which established the Matanuska Valley Colonization Project with funds granted by the Government of the United States (R. 58-59). Pursuant to the plan of this colonization project "worthy and qualified persons", potential farmers, were shipped at the expense of the Government from the different States to the Matanuska Valley, there to be rehabilitated, furnished with homes and supported, all at Government expense, until they became self-supporting. Paragraph (4) of the Contract was designed for the benefit of these persons and was applied as "justified by the producers' immediate needs" (Paragraph (4)).

As under the terms of the Contract, the Association became the owners of the produce from the time it was in the ground, no doubt the Association was confronted with many requests for advances from these more or less penniless colonists. After the Association took over the assets of the Corporation in January, 1940, for the reason that the Corporation could not and would no longer finance the project (Testimony of Roland Snodgrass, R. 353-358), the project began to pay. About the middle of the year 1940 the Association bought out the East Side Dairy in Anchorage and started in the business of marketing milk in Anchorage (R. 357). Also about this time the war boom started, an Army Post was established at Fort Richardson, thousands of soldiers were brought in and millions of dollars spent by the Government, resulting in a greatly increased population and market for the

Matanuska products, and a large profit was made from the milk business.

Thereafter, the Association substituted for the system of "requested advances, justified by the producers' immediate needs and by marketing conditions" a system of uniform cash advance payments, and paid the producer the balance of the purchase price according to the provisions of paragraph (7) of the Contract, after the yearly audit had been made, as shown by the oral and record evidence in the case.

The Association continued to purchase the dairymen's milk under paragraph (7) of the Contract, but the system of making advances under paragraph (4) was adapted to the new conditions.

However, notwithstanding the favorable conditions above mentioned, the Association succeeded in losing money during the 1945 period in all its cooperative enterprises, except the Warehouse, Community Hall and Fountain, and Dairy-Creamery Unit. The Trading Post, with a grocery department, hardware department and dry goods department lost $10,095.64, the garage lost $20,331.29, the meat department $13,319.08, the produce department, that is, vegetable produce, $20,319.12.

Roland Snodgrass, the manager during this period, admitted that every garage and every grocery store in the Third Division of the Territory, except the Co-Op garage and grocery, made money in 1945 (R. 460).

The profits of the Association as a whole from December 1, 1944, to November 30, 1945, were $2,889.29.

The profits of the Dairy-Creamery Department were $57,001.58 (Plaintiff's Exhibit No. 6, page 19). After the audit of the year's operations made in February, 1946, the plaintiff dairymen demanded their share of this profit, that is, the amount due them under paragraph (7) of the Contract. They were informed that although they were morally entitled to the money there were no funds available (R. 198). There is no testimony in the record that the dairymen were then informed or at any time informed that they had been selling their milk at a flat price and that they had nothing coming.

It was after the commencement of this action that the flat price theory was evolved, which was later expounded by the testimony of the witness Snodgrass (R. 377-8).

Appellant further develops its flat price theory under paragraph 6 of its argument as follows (Brief, page 33):

> "In Practice the Parties Applied Paragraph (8); the Bi-Monthly Payments Were Prices for Milk Delivered on Cash Sales and the Annual Payments Were Dividends Proportioned Upon Such Sales."

This theorem is then demonstrated as follows:

> "(a) Paragraph (8) authorizes the Association to pay a flat delivery price as to all products delivered as it 'may process or manufacture * * * into changed or new products'. Pasteurizing milk constitutes a 'manufacture' or at least a 'process' ".

"(b) The Association processed the milk 'at its own expense and as its own product' within the meaning of paragraph (8)."

"(d) The Association did 'retain the full proceeds thereof as amounts belonging to the Association' as provided in paragraph (8)."

Therefore, in practice the parties applied paragraph (8) Q.E.D.

But, conceding for the purpose of argument that pasteurizing is "processing" within the meaning of paragraph (8) we contend:

1. That if purchased under paragraph (7) the milk would nevertheless have to be pasteurized;

2. That if purchased under paragraph (7) it would have to be pasteurized at the expense of the Association as its own product; and

3. We concede that for the production of 1945, at least, the Association did "retain the full proceeds thereof."

That is exactly what we are complaining about.

But there were no annual payments, as stated in Appellant's argument in paragraph 6.

Since and including 1941 there have been additional payments for the milk purchased the preceding year (Testimony of Snodgrass, R. 337), and these additional payments were prorated to the individual producers, where the milk was co-mingled or pooled, in proportion to their sales, and strictly as authorized by paragraph (7) of the Contract. These payments were

not "dividends" as Appellant contends and under the laws of Alaska, under which the Association was incorporated, could not be dividends.

It has been maintained by Appellant and is conceded by Appellee that from the time the Association went into the retail milk business in 1940 they purchased the dairymen's milk under the provisions of the Member's Standard Marketing Contract, and that, whether they purchased the milk under the provisions of paragraph (7) or paragraph (8) of the Contract, when delivered it became the property of the Association. When sold the proceeds of the sale became the property and assets of the Association.

This premise being agreed upon, Appellant's argument continues as follows (Brief, paragraph 7):

> "Payment of the amount demanded would constitute a payment out of capital in violation of the laws of Alaska, the Articles and By-Laws of the Corporation."

Appellant then quotes from Fletcher, Cyclopedia of Corporations, sec. 5329, as follows:

> "It is a well settled principle that as between the stockholders of the corporation and its creditors, the assets of a corporation are, in a sense, a trust fund for the payment of its debts and they cannot lawfully be distributed among the stockholders, even in part, to the prejudice of creditors. * * *"

Appellee emphatically agrees with this principle of law and invokes the same. Unquestionably the assets

of a corporation can be subjected to the payment of its debts, either by voluntary action, or by judgment and execution, as was necessary in the present case.

The writer of Appellant's Brief either does not or does not choose to recognize that the plaintiff in the Court below sued for the payment of a debt and not for a distribution of profits as dividends.

APPELLANT'S THEORY OF DISTRIBUTION OF PROFITS.

Paragraph 2 of Appellant's argument (Brief, page 16) is as follows:

> "The Interpretation of the Contract Under Long-Established Practice of the Parties Is to Be Given Great, if Not Controlling Consideration".

With this we agree.

In fact, Appellee's entire argument has, up to this point, been based upon the above proposition. It seems to be agreed that ever since the Association went into the dairy business in 1940 and up to the year in controversy, the Association, after the close of each fiscal year and after their books were audited, made additional payments to the milk producers for the milk sold the preceding year.

Appellant calls these payments "dividends", in paragraph 6 of its argument. Elsewhere in its Brief it contends that the payments were an "allocation of profits" (Brief, pages 20-21).

Appellee will now endeavor to demonstrate that any apportionment of profits of the Association, in the manner Appellant claims they were apportioned, would have been in violation of the laws of Alaska, the Articles of Incorporation and By-Laws of the Association.

Further than that, it will be demonstrated that the additional payments made to milk producers could not legally have been made, except as authorized by paragraph (7) of the Contract.

ARTICLES OF INCORPORATION.

The defendant Association was incorporated under the provisions of the Alaska Compiled Laws, Annotated, 1949, chaper 3 of Title 36, section 36-3-1 to section 36-3-8.

Section 36-3-4 contains the following clause:

> "For the purposes of this Act, the words 'company,' 'corporation,' 'association,' 'society' or 'union' are defined to mean a company, a corporation or association which authorizes the distribution of its earnings in part or wholly on the basis of or in proportion to the amount of property bought from or sold to members or other customers or of labor performed or other services rendered to the Association."

Section 36-3-5 provides:

> "7th. To make By-Laws for the management of its affairs and to provide therein the terms and

limitations of stock ownership and for the *distribution of its earnings within the limits of this Act.*" (Italics ours).

Section 36-3-8 is as follows:

"Sec. 36-3-8. *Disposition of earnings.* The directors, subject to revision by the Association at any regular or special meeting and not less than once each year, shall apportion the earnings of the association by first paying a dividend on the paid up capital stock, not exceeding eight per cent per annum, then setting aside not less than ten per cent of the net profits for a sinking fund, to be used in accordance with the by-laws of the association, and five per cent thereof for an educational fund to be used in teaching co-operation, and the remainder of said net profits shall be prorated by a uniform dividend to its several stockholders or other customers upon their purchases from, or sales to, said association or both such purchases and sales, and upon salaries of employees."

The last section quoted is set forth in full in Appellant's Brief, pages 39-40.

In conformity therewith the Articles of Incorporation of the Association were drawn.

Article III, section 2, of the Articles of Incorporation is as follows:

"Non-cumulative dividends in the nature of interest only and not to exceed eight per cent per annum may be paid upon each share of stock if, as and when declared, and net earnings may be apportioned in accordance with patronage after

> the setting aside of the required reserves, as are provided for in the Compiled Laws of the Territory of Alaska, 1933, pertaining to 'Co-operative Associations' and as are further set forth in the by-laws of this Association. * * *"

This also is set forth in full in Appellant's Brief, page 42.

It will be observed that section 36-3-8 limits the apportionment of the earnings of the Association to, first, a dividend not to exceed eight per cent on paid-up capital stock, and then after other apportionment of its earnings it provides that,

> "the remainder of said net profits shall be prorated by a *uniform* dividend to its several stockholders or other customers upon their *purchases from* or *sales to* said Association or *both such purchases and sales* and upon salaries of employees." (Italics ours.)

Article III, section 2, of the Articles of Incorporation above set forth, is drawn in conformity with the clause last above quoted and provides:

> "and net earnings may be apportioned in accordance with patronage after the setting aside of the required reserves, as are provided in the Compiled Laws of the Territory of Alaska, 1933, pertaining to 'Cooperative Associations' and as are further set forth in the by-laws of this Association."

It will be at once perceived that in accordance with the laws of Alaska, after certain specified apportion-

ments, the remainder of the net profits must be distributed as a dividend; that this dividend may be prorated solely upon *"sales to"* or *purchases from* the Association, *or both;* but that regardless of the basis of apportionment, the dividend must be *uniform* to the "several stockholders or other customers", who patronize the Association, and in proportion to their patronage. This requirement is in the law and in the Articles. The Association could no more limit the apportionment of profits to those stockholders who had sold produce to profit-making departments than to those who sold to departments which lost money.

In 1944 the sales by the vegetable farmers greatly exceeded the sales of the dairymen. On an apportionment of a dividend based on "sales to" the Association, the vegetable farmers would have received a far greater proportion thereof than the dairymen, although the Association lost money on the former and made a large profit on the sales of milk.

Appellant confuses the issue to an extent that is bewildering. On page 21 of its Brief, it says:

> "The audit was presented to and approved by the shareholders at their annual meeting. Then the Board allocated all or a substantial part of the profit of the Association to each of the departments, and those only, which showed a profit for the preceding fiscal year. This allocation was made in the proportion that the profit of each department bore to the profit of the Association as a whole (R. 374)."

This is not true—there never was an allocation of profits to departments which showed a profit. Using the same system of bookkeeping which had been used by its predecessor, the A.R.R.C., the Association audit segregated the operations of each department or unit and showed the profit or loss made by each.

Appellant continues on page 21:

> "The Association made payments to producers in cash (R. 362). Each producer who had sold agricultural products in a profit-making department would receive his share of the Association's profit allocated thereto in proportion that his dollar sales bore to the dollar sales of other producers to it (R. 351-352)."

The distribution of Association profits, whether called a dividend or "allocation" as above outlined, would have been absolutely contrary to law and the Articles of Incorporation.

On the other hand, the additional payments made to milk producers were made substantially in accordance with paragraph (7) of the Contract, and pro-rated on sales, as provided therein.

BY-LAWS.

The By-Laws of the defendant Association authorize the preparation of the Member's Standard Marketing Contract under which this action was brought. Section 3 of Article XII of the By-Laws is printed in full in Appellant's Brief on pages 42 and 43.

It provides that the member is bound to sell his agricultural products to or through the Association under such terms as the contract shall provide, including the following provision:

> "The Association to handle and sell such products singly or pooled and return to the member his net proceeds therefrom after deducting for expenses and Association obligations, including reserves and interest on shares of stock and other proper deductions have been made."

The foregoing quite clearly embraces the provisions of paragraph (7) of the Contract.

Section 5 (a) of Article XII of the By-Laws of the Association is as follows:

> "The principal monetary gain to a member through his selling activities is his share of the proceeds received from the final sale of his product after *proper deductions* are made for expenses and Association obligations above referred to. He may incidentally receive in addition dividends by the way of interest on his stock." (Italics ours).

It will be seen from reading these two sections that there is authority in the By-Laws for paragraph (7) of the Contract, but no provision for paragraph (8). That is, there is no authority granted to the Association to prepare or enter into a Member's Standard Marketing Contract containing any provision for buying produce from a member at a flat price. But, explicit authority is contained in the sections of the

By-Laws above quoted for the terms provided in paragraph (7).

The By-Laws, together with the Articles of Incorporation, were not printed in the record but are in evidence as Defendant's Exhibit No. II.

Now it is in evidence that commencing with 1941 and up to and including 1945, that is, for five successive years, the dairymen were made additional payments each year for their product of the preceding year.

There is no provision in the laws of Alaska, the Articles of Incorporation or the By-Laws under which these payments could have been made, except by virtue of the provisions of sections 3 and 5 of Article XII of the By-Laws of the Association and paragraph (7) of the Marketing Contract. These additional payments *were made,* as shown by the evidence. The By-Laws and Marketing Contract *do authorize them.*

The conclusion is irresistible that the additional payments were made in accordance with the provisions of paragraph (7) of the Contract.

This conclusion is consistent with all the testimony in the case, the laws of Alaska, the Articles of Incorporation and By-Laws of the Association.

The contention of Appellant is consistent neither with the facts nor the law.

Section 36-3-8, A.C.L.A. 1949, heretofore quoted, requires the apportionment of the earnings of the Association by dividends at least once each year. The

defendant Association introduced in evidence several extracts from the minute books of the Association but there was no evidence introduced to show that any dividend on the earnings of the Association was ever declared. If any such dividend was declared, it certainly would have appeared in the minutes of the Board of Directors and would have been introduced in evidence.

OPERATING EXPENSES.

Under the terms of paragraph (7) of the Contract, the Association agrees to pay or cause to be paid to the producer the amount received for the resale of his product, less certain specified deductions.

Among the deductions authorized are,

> "(b) Reasonable charges for the services of receiving, handling and selling said agricultural products under paragraph (5) of this Contract."
>
> "(c) Operating and maintenance expenses."

As has been shown, the By-Laws of the Association provide for a Marketing Contract authorizing these deductions.

As testified by the witness Snodgrass, the Association took over the operation of the entire civic center or corporation set-up at Palmer in January, 1940.

Quoting from the testimony of Snodgrass (R. 358):

> "Now, from that time on it maintained approximately the same bookkeeping system as the corporation had originally, * * * —it has maintained

approximately the same bookkeeping system, which gives first the profit and loss of the Association and then the breakdown into departments to see where the operation is satisfactory or where it is not satisfactory."

The Reports of Audit for the operations of 1944 and 1945, Defendant's Exhibit No. 1 and Plaintiff's Exhibit No. 6, show that under the system of bookkeeping referred to by the witness Snodgrass, the "reasonable charges for the services of receiving, handling and selling, etc.", referred to in item (b) above, were carried on the books under the head of "Operating Expenses". These expenses included all expenses directly chargeable to each particular department (R. 267). In the Report of Audit of 1946 the operating expenses of the dairy-creamery department for 1945 is set at $83,807.54 (Plaintiff's Exhibit No. 6, page 18).

These expenses are itemized on page 21 of the same exhibit.

Unfortunately, the expenses of the dairy-creamery department are not segregated as between the dairy and the creamery, the old system of bookkeeping in use before the Association undertook the business of selling milk being still maintained.

INDIRECT OVERHEAD.

The deduction authorized in paragraph (7) of the Contract "(c) Operating and maintenance expenses"

is carried on the books and audits of the Association as "Indirect Overhead".

This includes all the general operating expenses of the Association as a whole, not including those directly charged to the different departments under the head of "Operating Expenses".

The Dairy-Creamery Department is charged with $45,121.31 as its proportion of the Indirect Overhead for the 1945 fiscal year (Plaintiff's Exhibit No. 3, R. 182).

The plaintiff did not restrict the "Indirect Overhead" to this amount, as stated on page 31 of Appellant's Brief. The plaintiff accepted the defendant's figures.

The Association did not deduct a flat 12.494 per cent of gross revenues in each department as its proportion of the indirect overhead, "regardless of sales or mark-up", as stated on page 32 of Appellant's Brief. The Association apportioned the Indirect Overhead in the proportion that the gross sales of each department bore to the total gross sales of the Association (Plaintiff's Exhibit No. 6, page 19). The total sales of the Association for 1945 amounted to $1,091,439.21. The total Indirect Overhead of the Association for 1945 was $128,653.39, or 11.787 per cent of the total sales. The percentage apportioned to each department would normally be 11.787 per cent of its total sales, but the produce department was charged on the basis of 5/12 of the year, or 4.912 per cent. The other 7/12 was prorated to the other seven departments which

increased the percentage of each to 12.494 per cent of its total sales (Plaintiff's Exhibit No. 6, page 19) (Testimony of Allyn, R. 315).

The Indirect Overhead for 1944 was apportioned on exactly the same basis (Defendant's Exhibit No. 1, page 19). In that year the total sales of the Association were $1,303,343.64 (Defendant's Exhibit No. 1, page 17); the total Indirect Overhead was $104,-720.57, or 8.04 per cent; the produce department being charged with only 5/12 of its normal proportion, the other 7/12 was prorated to the other departments, increasing the percentage of each to 9.25 per cent of its total sales.

The Operating Expenses of all the departments of the Association, for the year 1945 totalled the sum of $246,888.05. The total "Indirect Overhead" for 1945 was $128,653.39. The sum of these two items, $375,-541.44, constitutes all the running expenses of the Association as a whole for the year 1945 (R. 309-310).

Of the total operating expenses in 1945 the Dairy-Creamery was charged with $83,807.54, which is itemized in the Report of Audit for that year's operations (Plaintiff's Exhibit No. 6, page 21). Of the total Indirect Overhead the Dairy-Creamery was charged with $45,121.31, which was based upon the proportion of its total sales to the total sales of all departments. The sum of the operating expenses and indirect overhead charged to the Dairy-Creamery for 1945 was $128,928.85 or 34.59 per cent of all the running expenses of the entire Association.

$128,928.85 represents the total deductions made from the resale of the Dairy-Creamery products in 1945, under (b) and (c) of paragraph (7) of the Contract, which was drawn in conformity with sections 3 and 5(a) of Article XII of the By-Laws of the Association.

As stated before, the By-Laws provide for the Contract and prescribe its terms. Signing it is a condition of the producer's membership in the Association.

It was in use long before the Association succeeded to the ownership of the Co-Operative Plant.

Beginning with the year 1941 and for five successive years, the Association paid the dairymen according to the terms of the Contract as interpreted by the Association. In all these years the Association treated the additional payments made to dairymen for the previous year's production as a part of the purchase price of the milk.

We agree with the proposition stated in the last paragraph on page 32 of Appellant's Brief, as follows:

> "An interpretation of paragraph (7), as well as other provisions of the Contract, must be made in view of the long-established practice of the parties."

AMOUNT OF RECOVERY.

The following is a condensed comparative statement of the operations of the Dairy-Creamery Unit for the fiscal years 1945, 1944 and 1943. The figures are taken

from Plaintiff's Exhibits Nos. 3 and 4, and Defendant's Exhibit No. 1, page 4.

Fiscal Year 1945	
Dairy and Creamery	
Sales	$361,145.56
Cost of Goods Sold	178,422.88
Gross Profit on Sales	$182,722.68
Expenses	
Operating Expenses	$ 83,807.54
Indirect Overhead	45,121.31
Total	$128,928.85
Net Profit from Operations	$53,793.83
Rent from Apts. in Dairy Bldg.	3,207.75
Departmental Earnings	$57,001.58
Fiscal Year 1944	
Sales	$262,995.79
Cost of Goods Sold	129,729.54
Gross Profit on Sales	$133,266.25
Operating Expenses	$ 45,499.92
Indirect Overhead	24,333.97
(Total Expenses not in Exhibit)	$ 69,833.89
Net Earnings of Department	$ 63,432.36
Rents	3,528.67
Total Departmental Earnings	$ 66,961.03

Fiscal Year 1943

Sales	$246,629.95
Cost of Goods Sold	131,679.59
Gross Profit on Sales	$114,944.36
Operating Expenses	$ 42,780.21
Indirect Overhead	23,212.39
Total	$ 65,992.60
Net Profit from Operations	$ 48,951.76
Rent	3,713.37
Departmental Earnings	$ 52,665.13

As before stated, the plaintiffs have been compelled to rely upon the books, records and audits of the Association, to prove their case. These show that the Association made a profit from dairy-creamery resales of $53,793.83, in 1945. To this is added the sum of $3,207.75 received as rents from apartments in the Dairy Building.

These rents were also credited as part of the profits in 1944 and 1943. However, the Court disallowed the item of rents as not being a profit derived from the sale of milk. It might have been properly credited as an offset to operating expenses.

Under paragraph (7) of the Contract the Association contracted to pay the dairymen the total amount received on the resale of their milk, less certain deductions, including (b) "reasonable charges for receiving, handling and selling" and (c) "operating and maintenance expenses", the first designated in

the books as "Operating Expenses", the second as "Indirect Overhead."

Using its inherited system of bookkeeping the Association has kept a combination account of the receipts and disbursements of the Dairy-Creamery Department with no segregation or apportionment of the amounts properly charged or credited to each.

It was the duty of the Association to segregate the accounts of the dairy and creamery, where they could be segregated, and to apportion them on some fair basis where they could not be segregated with certainty.

At the trial the plaintiff sought vainly to ascertain from the testimony of the witness Allyn, the chief accountant and assistant general manager of the Association, the percentage of the profit of the Dairy-Creamery Department earned by the creamery in 1945.

Allyn was called as a witness on March 14, 1947, and at various times between that date and July 15, 1947, and was repeatedly requested to produce this information. He testified (R. 282-3) that on the basis of the calculations made for the year 1944 the Creamery earned $20,457.87 and the Dairy earned $36,543.71 in 1945; that the apportionment was made on the basis of the apportionment made in 1944 which was considered to be and was accepted by all the parties as a "fair and equitable distribution", that "of necessity it is arbitrary".

On July 15, 1947, the following proceedings were had at the trial:

> Mr. Davis. Your Honor, before proceeding, at the time we met last, Mr. Grigsby asked that certain figures from the original records be furnished to him. It has developed that it has been impossible to dig out those figures. The defendants have brought down the original records in question and they are in the court room available for examination by Mr. Grigsby or anybody that he may wish to have examine them. (R. 564-5).

Mr. Grisby declined to attempt to "dig out" what the expert accountant had found it impossible to "dig out" in four months.

Allyn then testified for the defendant as follows:

> A. * * * Subsequent to the last session of the court, when I had the opportunity to review this material again, it was called to my attention that the year 1944 and 1945 are not applicable and the arbitrary method used in 1944 could not be applied to 1945 because of the fact that you had no eggs handled through the department in '44, and eggs were a considerable part of your business in 1945. So, an arbitrary system wouldn't apply to the two years.
>
> Q. Now, Mr. Allyn, are the two years, 1944 and 1945, then, comparable in the breakdown between the Creamery Department and the Dairy Department? Can they be compared from the figures that are available?
>
> A. No, they can not.
>
> Q. And what, then, about this testimony you gave us? Is it valid testimony as to the break-

down between the two, or should that be disregarded?

A. From my standpoint, it should be disregarded.

Q. Is there any way you have been able to work out a relationship between the creamery and the dairy from the year 1945?

A. It has not been possible.

The Court. Between what?

The Witness. '44 and '45. (R. 566-7).

In computing the amount of the judgment to which plaintiff was entitled the trial Court deducted the two per cent of gross sales provided for in paragraph (7)(e) of the Contract, the Court stating that this deduction had not been made on the books. As the books did not segregate the sales of milk from the sales of other creamery products there was no basis provided for making this deduction. The Court made the deduction as favorably to the Association as the evidence justified (R. 591-2).

In 1944 the Association made a profit of $66,961.03 on Dairy-Creamery operations, on sales amounting to $262,995.79.

Using the arbitrary method of apportionment of these profits described by the witness Allyn (R. 283) the Association retained $18,943.42 thereof, as the Creamery's share of the profits. This was according to Allyn's testimony and arbitrary apportionment and resulted in the dairymen receiving additional payments for their milk, in two payments made in 1945, aggregating 41.125 per cent of their cash sales of 1944.

The $18,943.42 retained by the Association was used according to the testimony of Snodgrass, the manager, "to plug up different holes" where the Departments made a loss (R. 511). The dairymen had made no complaint of this apportionment as the cash advances plus the additional payments gave them an acceptable return for the milk sold. This was likewise true of all the previous years' operations.

But for the year 1945, the Association, having many more "holes to plug" kept all the profits, and decided that it had bought the milk at a flat price. The trial Court found against this contention and that the dairymen were entitled to a judgment for $28,700.60.

CONCLUSION.

The Appellee sued on a Marketing Contract of purchase and sales. There is nothing in this Contract which takes away from any producer any part of his right of free enterprise. The producers did not agree to share profits and losses with other producers nor to make themselves partners of the vegetable farmers, nor of each other.

There is nothing in the Contract which takes away the reward of the thrifty, industrious and competent producer or that compels him to share his profits with or assume the losses of the indolent and incompetent. He sells his product according to the terms of a Contract which is authorized by the By-Laws and which contemplates, as stated in the By-Laws, that

> "The principal direct monetary gains to a member through his selling activities is his share of the proceeds received from the final sale of his product after proper deductions were made for expenses and Association obligations."

In the Contract the Association established what it considered the "proper" deductions. The producer, who signed the Contract, agreed to them.

The defendant Association has organized certain industries and enterprises, which the plaintiff and others who signed the Marketing Contract have agreed to patronize as members and stockholders of the Association and as such part owners thereof it was to their interest to patronize them, as well as to the interests of the Association. There is nothing in this part of the Contract which has anything to do with the interpretation of those clauses of the Contract which pertain to this lawsuit.

In the Brief of Appellant it is repeatedly urged that the payment of their obligation will deplete the assets of the Association and defeat the entire purpose of the colonization project. This is not a defense to a just claim nor is the history of the project and the relation of the Association to the government any defense. Even if probable that payment would result in the failure of the project and the liquidation of its assets, the plaintiffs, as stockholders and as such part owners, would suffer in their just proportion without being called upon to donate their personal earnings to the ruin.

It is inevitable that a corporation which cannot pay its debts must fail.

The situation of the dairymen is to be considered. They have an investment. They bear all the expenses incident to maintaining and operating a dairy farm up to the delivery of the milk produced. Under the Contract the dairymen have paid more than one-third of all the running expenses, direct and indirect, of all the Departments of the Association.

Appellant contends that the Association is doomed to liquidation if its capital is depleted by payment of its debt.

The record shows that the Association would not have survived to the date of this lawsuit except for the profits made from the dairymen's sales, during the five years' operations.

What profit the dairymen themselves have made during this period is not in evidence. Undoubtedly they earned it. The judgment of the District Court should be affirmed.

Dated, Anchorage, Alaska,
February 9, 1951.

Respectfully submitted,
GEORGE B. GRIGSBY,
Attorney for Appellee.